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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. LEWIS BART STONE PART 50

Index Number : 115705/2007

NEIGHBORHOOD IN THE NINETIES

VS

BOARD OF STANDARDS AND APPEALS

Sequence Number : 003

REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is denied in accordance with the annexed Decision and Order

FILED
MAR 17 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 3/12/10

Lewis Bart Stone
J.S.C.
HON. LEWIS BART STONE

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 50-S

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In the Matter of the Application of NEIGHBORHOOD IN THE NINETIES, INC., AARON BILLER, ROLANDE CUTNER, LAWRENCE LIBERSTEIN CATHERINE BINDMAN, ARMIN KUNZ, KATHY PASSERO, SHARON GAFFNEY, MICHAEL DiSTASIO, DAVID HENDRICKS, JOHN HUGILL, JACQUELINE HOWELL, RICHARD SCHWARTZ, ROBERT REMIEN, JUDITH AMORY, EDWARD GRIMM, MARINA HIGGINS, JOAN MORGAN, JUANITA STREULI, and JAMES and MONA CANNING,

Petitioners,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

-against

CITY OF NEW YORK BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK, DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT, NEW YORK CITY HOUSING DEVELOPMENT CORPORATION, THE LANTERN GROUP, INC., LANTERN GROUP FOUNDATION, INC., LANTERN INVESTMENT GROUP, LLC, 319 REALTY SERVICES L.P., 319 WEST LLC, ST. LOUIS L.P. AUDUBON HOUSING DEVELOPMENT FUND CORPORATION, FRIENDS IN THE CITY, INC., MiCASA HDFC, MEL-AP HOTEL CORP., IRENE SHREYBERG, CITY PLANNING COMMISSION, "JOHN AND JANE DOES" 1 -10 and XYZ Corp./LLC/LLP 1-10,

Respondents.

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DECISION AND ORDER

Index Number 115705/07

HPD

Hon. Lewis Bart Stone, J.

This proceeding was initially commenced on January 17, 2008 by Petitioners, Neighborhood in the Nineties, Inc., and others (collectively "Petitioners") pursuant to Civil Practice Law and Rules ("CPLR") Article 78 to block the reconstruction of a building located at 319 West 94th Street in Manhattan (the "Building"). Certain respondents (the "Developers") had proposed to renovate and modify the 90 year old Building, operated as a single room occupancy dwelling to improve its safety and modify the building to qualify it to serve persons in need of substantial social support and to maintain their ability to live independently, as required by governmental standards imposed for such programs. As a result of physical constraints on the existing Building and requirements to achieve the necessary changes within the context of reasonable costs, the Developers sought certain minor zoning variances and made application therefor to respondent New York City Board of Standards and Appeals ("BSA") pursuant to New York City Charter §666.

Upon an initial grant of variances (the "Initial Variance"), Petitioners, neighbors and residents of the Building and a corporation organized by them and others to oppose the project, commenced this Proceeding to set aside the Initial Variance. After initial skirmishes revealed that BSA may have given inadequate notice of the variance process, BSA withdrew the Initial Variance, re-noticed the

process, and after conducting hearings, issued a new variance (the "Final Variance") on July 15, 2008, which would have enabled the project to proceed.

Petitioners continued their resistance to the project and attacked the Final Variance in an Amended Petition, which was, by the parties agreement, heard by this Court, and eventually, after extensive briefing arguments and motions, ruled upon by this Court in a Decision and Order dated August 13, 2009, (the "2009 Order"). Notice of Entry of the 2009 Order was served on September 1, 2009. The Court's fifty-nine page 2009 Order reviewed the three foot thick stack of motion papers and exhibits, the extensive record on oral arguments made by the parties, and dismissed the Petition.

Petitioners have since appealed the 2009 Order to the Appellate Division, First Department.

Notwithstanding such appeal, Petitioners subsequently moved this Court by Notice of Motion, dated October 1, 2009 (the "October Motion"), to resettle the 2009 Order and to reargue the motions decided by the 2009 Order, setting a return date of October 28, 2009. The October Motion was accompanied by exhibits measuring over two inches thick. Respondents BSA and the Developers each opposed the Motion to reargue. BSA took no position on the request for resettlement of the 2009 Order. While papers were delivered to this Court by December 16, 2009, Petitioners also

sought oral argument. The Court thereafter initially sought agreement of the parties to schedule such oral argument but the parties could not agree and the Court finally held a conference call with the parties on January 27, 2010, to schedule such argument. On such call, Respondents opposed oral argument as another delay. After discussion with the parties to see whether oral argument was needed, this Court denied the Petitioner's request for oral argument and deemed the October Motion submitted.

Motion to Resettle

Petitioners initially pray in their Motion for a "resettle[ment] of the Decision and Order, dated August 13, 2009." "Resettlement contemplates an endeavor to reflect the disposition more accurately." Siegal, Practice Commentaries to CPLR, C 2221:7. Although both Petitioners and Respondent BSA point to language in the decision and order that they find inaccurate, none of these supposed errors either rise to materiality or in any way affect the accuracy of the disposition.

The disposition under the 2009 Order was to dismiss the Petition. No issue raised by Petitioner or BSA would in any way modify the "accuracy" of such disposition.

Petitioners first assert that this Court made "findings" in the Decision and Order that Petitioners submitted material outside of the record before BSA and that Respondent's objected. Petitioners assert that the submission of extraneous material was made by Respondent and Petitioner objected. In fact, as Respondent BSA notes, both Petitioners and Developers attempted to introduce such additional material. As this Court made clear in the 2009 Order that it would not and did not consider any material not before the BSA at the time it granted the variance, whether submitted by Petitioner or Respondent, in determining whether the BSA acted arbitrarily or capriciously on the record before it, any discussion in the 2009 Order as to who submitted the extraneous material in no way affected the accuracy of the disposition.

As a second "error" requiring resettlement, Petitioners and BSA note that the caption was supposed to have been amended to reflect the appropriate owner of the Building in the caption. Again as the 2009 Order dismissed the petition, any discrepancy of a respondent's name is irrelevant and does not affect the "accuracy" of the 2009 Order.

Finally, BSA notes an additional issue which it suggests might be reflected in any resettlement, if one were ordered. This relates to the Court's assertion that the Final Variance authorized a demolition of 83% of the floor area of the Building, rather than the 75% permitted under Zoning Resolution, while in fact the Final

Variance allowed demolition of 80%, not 83%. While BSA is correct that the 2009 Order contained this typographical error, resettlement is not necessary. No change is needed to reflect more "accurately" the meaning of the 2009 Order. The 2009 Order would be equally clear in dismissing the Petition whether the number 80% or 83% was used.

Thus, no resettlement is needed to change the accuracy of the 2009 Order.

Further, a determination to resettle an order is within the discretion of the Court. Here, this Court notes that the proposed project has been supported by various City agencies for several years while the litigation has been pending and that the 2009 Order is already on appeal to the First Department and that any allegation of error by this Court refers to matters in the record which the parties may address on such appeal. On the other hand, any resettling of the 2009 Order to address irrelevant typos or matters not affecting the decision may create a basis for a further delay of the resolution of what the City believes to be a beneficial project, notwithstanding local opposition and the presence a developer which seems still willing to invest in jobs and commercial activity in a time of substantial unemployment and reduced commercial activity. Thus, as a matter of discretion, this Court would, even if it might be otherwise appropriate to resettle the 2009 Order, elect not to do so. As an appeal is pending, the failure to exercise any discretion will only have the effect of

not prolonging this long standing litigation,[1] and cannot affect the rights of a party.

Motion to Reargue

Petitioners also seek to reargue their motion.

The purpose of a motion to reargue is to permit a Court to reconsider a decision issued in error of fact or law, and "seeks to convince the Judge that the decision was in error and should be changed." Siegal, McKinney's Practice Commentary to CPLR Rule 2221, C. 2221.7.

This Court has reviewed Petitioner's Motion and supporting Memorandum of Law and is unpersuaded that this Court's Decision and Order was based on an error of law. While Petitioner's Motion disputes certain of the legal conclusions reached by this Court in the 2009 Order, this Court had already fully considered and rejected such arguments prior to issuing the 2009 Order and finds no basis to reverse its own determinations of law, Petitioners, of course may seek review of this Court's determinations in their appeal. To the extent Petitioners advance arguments not presented to this Court prior to the Court's issuance of the 2009 Order, such arguments are untimely.

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[1] A litigant has no right to a dilatory tactical delay of a final decision by a court or appellate court.

A Motion to reargue may also be directed to a factual determination to enable a Court to correct an error of fact.

Such direction, however, presupposes that the Court made findings of facts which were erroneous. Such a motion, however, would be properly addressed to a situation only where the Court acted as a finder of fact. Here, the Court had before it a Petition commenced under CPLR Article 78, a proceeding where factual issues are not or ordinarily to be considered by the Supreme Court.[2] While CPLR §7804(h) recognizes that within the context of a proceeding under CPLR Article 78, factual issues itself may arise, and may be tried, no such actual issues were raised nor had trial been had thereon prior to the issuance of the 2009 Order. Thus, there are no factual findings in the Order which may be subject to a Motion to Reargue.

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[2] While CPLR §7803(4) permits review of a quasi-judicial administrative determination on the grounds that it was not supported by substantial evidence, the grant of a Variance by BSA is not such a determination. In any event, any claim under §7803(4) must be referred to the Appellate Division under CPLR §7804(g), and would therefore be beyond the power of this Court to consider, either under the original Petition or in a motion to reargue.

Accordingly, Petitioner's Motion to Resettle and Reargue are denied.

This is the Decision and Order of the Court.

DATED: MARCH 12, 2010
NEW YORK, NEW YORK

Hon. Lewis Bart Stone
Justice of the Supreme Court